

## Memorandum 69-56

Subject: Study 36 - Condemnation Law and Procedure (Excess Condemnation)

Attached to this Memorandum is a draft statute relating to remnant acquisitions (Exhibit I) and a draft statute relating to protective acquisitions (Exhibit II). In preparing these statutes, the staff has considered the various suggestions made by members of the Commission at the last meeting.

Remnant Acquisitions

The staff recommended draft statute is attached as Exhibit I.

At the last meeting, it was suggested that excess condemnation should be authorized only where the value of the remainder after the taking is reduced by a specified percentage as determined by the jury verdict. In other words, the jury determines the value of the remainder in the before condition as a part of the larger parcel, its value in the after condition as affected by the improvement, and the severance damages.

There are two difficulties with the suggested approach. First, the cost to cure is often the measure of severance damages. For example, often the severance damages can be avoided by some action taken by the landowner and the measure of the damages is basically the cost of taking that action. In such a case, the parties are directing their evidence to the cost to cure, not to the value of the remainder in the before and after condition. Thus, the suggested approach would not work in a cost to cure case. Second, and more important, the suggested approach assumes that the severance damage concept will be retained when the Commission considers the

measure of damages in a partial taking case. In California, monetary values are assigned to (1) the property taken, called the take, (2) the damages inflicted on the remaining property due to the taking itself, called severance damages, and (3) the benefits received by the improved property resulting from the construction of the improvement. "Just compensation" is determined by offsetting the benefits against the severance damages and then adding the value of the take. The California approach involves many problems, not the least of which is the determination of what constitutes general and special damages and benefits. By contrast, in the federal courts and in other states, "just compensation" is the difference between the fair market value of the entire property before the taking and the fair market value of the remaining property after the construction of the improvement. Damages to the remainder and benefits are not given separate consideration in this "before and after" formula but are reflected in the award to the extent that they affect the fair market value of the remaining property. This brief summary is taken from Benefits and Just Compensation in California, 20 Hastings L. J. 764 (1969) (we sent you a copy of this). The author of the Hastings Law Journal points out the deficiencies in the California rule and proposes that the federal rule be adopted in California. For this reason, the staff believes that it would be undesirable to base a solution to the excess condemnation problem on the "severance damage" concept. Nevertheless, the staff has provided what we think is a workable scheme that is based on the suggestion made at the last meeting. Not only does this scheme benefit the condemnee, but it also may benefit the condemnor. See Exhibit I. In connection with the suggested scheme, you

should be aware of People v. Nyrin, 256 Cal. App.2d 288, 63 Cal. Rptr. 905 (1967). In this case, the court held that the Department of Public Works, having elected to condemn what it believed to be the larger parcel, could not restrict the taking to the part actually needed for the public project when it later developed that the larger parcel included land not taken and substantial severance damages were awarded. The look-at-the-jury-verdict approach which is provided by the draft statute and the "remittitur" feature also included in that statute should provide a good statutory scheme for resolving excess condemnation cases where the need for the excess condemnation is not clear.

We do not know whether we have found all the remnant acquisition statutes. We have included all that we are aware of in the draft statute.

#### Protective Acquisitions

The staff recommended draft statute is attached as Exhibit II.

#### General Comment

The purpose of submitting the draft statutes for Commission consideration at this time is to direct and facilitate discussion of a possible approach to the problems. It is recognized that much additional work would be needed to work out the details. For example, the practical effect of giving the owner a right to repurchase the property if it is to be sold subject to restrictions would have to be given further study.

Respectfully submitted,

John H. DeMouly  
Executive Secretary

EXHIBIT I

DRAFT STATUTE - REMNANT ACQUISITIONS

Section 1. Section 1238.8 is added to the Code of Civil Procedure, to read:

1238.8. Where a public entity acquires property for a public use and exercises or could have exercised the right of eminent domain to acquire such property for such use, the public entity may exercise the right of eminent domain to acquire such additional property as is reasonably necessary to provide access to an existing public road from any property which is not acquired for such public use but which is deprived of access to a public road as a result of the acquisition by the public entity.

Sec. 2. Section 1265.1 is added to the Code of Civil Procedure, to read:

1265.1. (1) Whenever a part of a parcel of property is to be taken by a public entity for public use and the remainder is to be left in such shape or condition as to be of little value to its owner or to give rise to excessive severance or consequential damages, the condemnor may acquire the whole parcel.

(2) If the public entity intends to sell the remainder or to devote the remainder to a use for which it could not have acquired the remainder by eminent domain, the public entity may acquire the whole parcel by eminent domain only if the court finds that the remainder would be left in such shape or condition as to be of little value to its owner or to give rise to excessive severance or consequential damages. In making its finding, the court shall take into

§ 1265.1

account all reasonable means by which the condemnor could avoid the need to take the whole parcel, including but not limited to the right given the condemnor by Section 1238.8.

(3) The condemnor has the burden of proof to establish the facts that justify the taking of the whole parcel in those cases described in subdivision (2). However, in such cases, if the condemnor has adopted a resolution of necessity which contains an express finding that the remainder would be left in such shape or condition as to be of little value to its owner or to give rise to excessive severance or consequential damages, it is presumed that the taking of the whole parcel is justified under subdivision (2). This presumption is a presumption affecting the burden of producing evidence.

(4) In any case described in subdivision (2), if the court is not persuaded prior to instructing the jury that the taking of the whole parcel is justified under subdivision (2), the court shall instruct the jury to determine (1) the amount to which the condemnee would be entitled if only the part of the parcel to be devoted to the public use were taken and (2) the amount to which the condemnee would be entitled if the whole parcel were taken. After the jury has made its determinations, the court shall determine whether the taking of the whole parcel is justified under subdivision (2) and, if the court determines that the taking of the whole parcel is justified under subdivision (2), the condemnor may elect to take either the whole parcel or only the part of the parcel which is to be devoted to the public use. As an alternative to permitting the condemnor to take the entire parcel, the court in its discretion may permit the condemnor

to take only the part of the parcel to be devoted to the public use if the condemnee elects to agree to a reduction of the severance and consequential damages to such amount as the court designates.

§ 1266

Sec. 3. Section 1266 of the Code of Civil Procedure is repealed.

~~1266. --Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel.~~

§ 104.1

Sec. 4. Section 104.1 of the Streets and Highways Code is repealed.

~~104.1.--Wherever-a-part-of-a-parcel-of-land-is-to-be-taken-for state-highway-purposes-and-the-remainder-is-to-be-left-in-such-shape or-condition-as-to-be-of-little-value-to-its-owner,-or-to-give-rise to-claims-or-litigation-concerning-severance-or-other-damage,-the department-may-acquire-the-whole-parcel-and-may-sell-the-remainder or-may-exchange-the-same-for-other-property-needed-for-state-highway purposes.~~

§ 943.1

Sec. 5. Section 943.1 of the Streets and Highways Code is repealed.

~~943.1--Whenever a part of a parcel of land is to be taken for county highway purposes and the remainder of such parcel is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damages, the county may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for county highway purposes.~~

§ 254

Sec. 6. Section 254 of the Water Code is repealed.

~~254.--Whenever a part of a parcel of land is to be taken for state dam or water purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state dam or water purposes.~~

§ 8590.1

Sec. 7. Section 8590.1 of the Water Code is repealed.

~~8590.1.--Wherever a part of a parcel of land is to be taken for purposes as set forth in Section 8590 of this code and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the board may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for purposes as set forth in Section 8590 of this code.~~

Sec. 8. Section 11575.2 of the Water Code is repealed.

~~11575.2--Whenever a part of a parcel of land is to be taken for state water development purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and shall sell the remainder or shall exchange the same for other property needed for state water development purposes.~~

Sec. 9. Section 43533 of the Water Code is repealed.

~~43533---Whenever a part of a parcel of land is to be acquired pursuant to this article and any portion of the remainder is to be left in such shape or condition as to be of little value to its owner, the board may acquire and sell such portion or may exchange the same for other property needed to carry out the powers conferred on said board.~~

Sec. 10. Water Code Appendix Section 28-16-5/8 is repealed:

~~Sec. 16-5/8. Whenever a part only of a larger parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land of which the area required for public use is a part. Or, in lieu of such acquisition, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the said remainder for use by the public, including the owner of the land.~~

Sec. 11. Water Code Appendix Section 28-16 3/4 is repealed.

~~Sec. 16-3/4. Whenever a part only of a house or other structure must be taken or removed in order to use the land on which such structure is situated for flood control or water conservation purposes and the severance of such portion of the structure from the whole structure would cause a substantial damage to the structure, the Board of Supervisors of the Los Angeles Flood Control District may condemn or otherwise acquire the entire house or structure and thereafter sell or otherwise cause the said structure to be removed from the portion of the land so required for a public use.~~

§ 48-9.2

Sec. 12.1. Water Code Appendix Section 48-9.2 is repealed.

~~48-9.2.---Whenever a part only of a parcel of land is required by the district for any purpose authorized by this act and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may purchase, condemn, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes.---In lieu of such acquisition of the remainder, the district may purchase, condemn or otherwise acquire a right-of-way or real property for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

§ 49-6.1

Sec. 12.2. Water Code Appendix Section 49-6.1 is amended to read:

~~49-6.1. Whenever a part only of a parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land. No authority is hereby granted to the district by Section 1265.1 of the Code of Civil Procedure to acquire riding and hiking trails by condemnation.~~

Sec. 12.3. Water Code Appendix Section 51.3.4 is amended

to read:

51-3.4. The agency shall have the power of eminent domain to acquire within or outside the agency by condemnation in the manner and to the extent prescribed in Article 1, Section 14 of the Constitution and Title 7, Part 3 of the Code of Civil Procedure, as now existing or hereafter amended, all property or interests therein necessary or convenient for carrying out the powers and purposes of the agency except that the agency shall not have power to acquire by condemnation publicly owned property held or used for the development, storage or distribution of water for public use; and it is hereby declared that the use of the property which may be condemned, taken or appropriated under the provisions of this act, is a public use, subject to regulation and control of the state in the manner prescribed by law. The district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location, and provided further that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated.

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the agency for any purpose authorized by this act, the agency may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the agency.

The power of eminent domain vested in the agency shall include the power to condemn in the name of the agency either the fee simple or any lesser estate or interest in any property which the board of directors by resolution shall determine is necessary for carrying out the purposes of the agency. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

- (a) The public necessity for the proposed public improvement.
- (b) The property or property interest being acquired is necessary for the proposed public use.
- (c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

~~Whenever a part only of a parcel is required by the agency for any purpose authorized by this act, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the agency may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for agency purposes, or, in lieu of such acquisition of the remainder, the agency may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

Sec. 12. Water Code Appendix Section 36-16.1 is repealed.

~~Sec. 16.1. --Whenever a part only of a parcel of land is required by the district for the control or conservation of flood, storm, or other waste waters, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

Sec. 13. Water Code Appendix Section 55-28.1 is repealed.

~~Sec. 28.1. --Whenever land is to be condemned by the district for any of the uses and purposes permitted by law, and the taking of a part of a parcel of land would leave the remainder thereof in such size or shape or condition as to require the district to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the board may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that the district acquire the whole of such parcel.~~

§ 60-6.1

Sec. 14. Water Code Appendix Section 60-6.1 is repealed.

~~Sec. 6.1. --Whenever a part only of a parcel of land is required by the district, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder of a portion thereof, or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land or such portion of the remainder to which access is impaired and may sell the remainder or exchange the same for other property required for district purposes. -- Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

Sec. 14.1. Water Code Appendix Section 74-5 is amended

to read:

**74-5.** The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual succession.
2. To sue and be sued in the name of said district.
3. To adopt a seal.
4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation, construction, or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including lands, structures, buildings, rights-of-way, easements, and privileges, and to construct, maintain, alter and operate any and all works or improvements, within or without the district, necessary or proper to carry out any of the objects or purposes of this act and convenient to the full exercise of its powers, and to complete, extend, add to, alter, remove, repair or otherwise improve any works, or improvements, or property acquired by it as authorized by this act.
5. To control the flood and storm waters of said district and the flood and storm waters of streams that have their sources outside of said district, but which streams and the floodwaters thereof flow into said district, and to conserve such waters for beneficial and useful purposes of said district by spreading, storing, retaining and causing to percolate into the soil within or without said district, or to save or conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, harbors, public highways, life and property in said district, and the watercourses outside of the district of streams flowing into the district, and to prevent waste of water or diminution of the water supply in, or exportation of water from said district, and to obtain, retain and reclaim drainage, storm, flood and other waters for beneficial use in said district; provided, that nothing in this act contained shall authorize the carrying out of any plan of improvement, the purpose of which is, or the effect of which will be, to take water which flows in any watershed in said district and transport or sell same for use anywhere outside of the district when the water level of any gravel beds within the district is below the normal level and such water could reasonably be used to replenish the water level of said gravel beds; provided further, that none of the provisions of this act shall preclude the exercise by any other political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising its powers, although such powers may be of the same nature as the powers of said district. Any such other political subdivision may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other political subdivision has an interest, or for the use, or joint use, of property or facilities in which said district has an interest.
6. To cooperate and to act in conjunction with the State of California, or any of its engineers, officers, boards, commissions, departments or agencies, or with the government of the United States, or any of its engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of Santa Barbara, in the construction of any work for the controlling of flood or storm waters of or flowing into said district, or for the protection of life or property therein, or for the purpose of conserving said waters for beneficial use within said district, or in any other works, acts, or purposes provided for herein, and to adopt and carry out any definite plan or system of work for any such purpose.
7. To carry on technical and other investigations of all kinds, make measurements, collect data and make analyses, studies, and inspections pertaining to water supply, water rights, control of storm waters and floods and use of water, both within and without said district, and for such purposes said district shall have the right of access through its authorized representatives to all properties within said district. The district, through its authorized representatives, may enter upon such lands and make examinations, surveys, and maps thereof.

8. To enter upon any land, to make surveys and locate the necessary works of improvement and the lines for channels, conduits, canals, pipelines, roadways and other rights-of-way; to acquire by purchase, lease, contract, condemnation, gift, devise, or other legal means all lands and water and water rights and other property necessary or convenient for the construction, use, supply, maintenance, repair and improvement of said works, including works constructed and being constructed by private owners, lands for reservoirs for storage of necessary water, and all necessary appurtenances; to enter into contracts and agreements with, and do any acts necessary or proper for the performance of any such contracts and agreements with the United States, or any state, county, district of any kind, public or private or municipal corporation, association, firm, or individual, or any number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, works or other property of a kind which might be lawfully acquired or owned by the district; to acquire the right to store water in any reservoirs, or to carry water through any canal, ditch or conduit not owned or controlled by the district; to grant to any owner or lessee the right to the use of any water or right to store such water in any reservoir of the district, or to carry such water through any tunnels, canal, ditch, or conduit of the district; to enter into and do any acts necessary or proper for the performance of any agreement with any district of any kind, public or private corporation, association, firm or individual, or any number of them for the transfer or delivery to any such district, corporation, association, firm or individual of any water right or water pumped, stored, appropriated or otherwise acquired or secured, for the use of the district or for the purpose of exchanging the same for other water, water right or water supply in exchange for water, water or water supply to be delivered to said district by the other party to said agreement.

9. To incur indebtedness and to issue bonds in the manner herein provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, and to employ labor, and to do all acts necessary for the full exercise of all powers vested in said district or any of the officers thereof by this act.

12. To exercise the right of eminent domain, either within or without said district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or other public corporation, or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction, or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles, of any public utility which is required to be moved to a new location; and provided further, that notwithstanding any other provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in said district to take by proceedings in eminent domain any property, including water rights, appropriated to public use by any existing city and county or municipal utility district. The district shall also have and may exercise the right to condemn any existing works or improvements in said district or along streams flowing into said district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in said district or along streams flowing into said district from damage from such flood or storm waters, and it is hereby declared that the use of the property, lands, rights-of-way, easements, or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the state in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize said district, or any person or persons to divert the waters of any river, creek, stream, irrigation system, canal or ditch, or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement, or interest in any real property which the board of directors of the district by resolution shall determine is necessary for carrying out the purposes of this act. Such resolution, adopted by a two-thirds vote of all its members, shall be conclusive evidence of all of the following:

- (a) The public necessity for the proposed public improvement.
- (b) The property or property interest being acquired is necessary for the proposed public use.
- (c) Such proposed public improvement is planned or located in the manner which will be compatible with the greatest public good and the least private injury.

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district.

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing city and county or municipal utility district or other district or public agency to provide for a water supply for such city and county or municipal utility district, or as affecting the absolute control of any properties of such city and county or municipal utility district necessary for such water supply and nothing herein contained shall be construed as vesting any power of control over such properties in such Santa Barbara County Flood Control and Water Conservation District or in any officer thereof, or in any person referred to in this act.

~~12.1. Whenever a part only of a parcel is required by the district for any purpose authorized by this act, and the taking thereof, and the construction of the proposed public improvement thereon, will interfere with reasonable access to the remainder or will otherwise cause substantial damage to the remainder, the district may condemn, purchase, or otherwise acquire the whole parcel of land and may sell the remainder or exchange the same for other property required for district purposes. Or, in lieu of such acquisition of the remainder, the district may condemn, purchase, or otherwise acquire an easement for ingress to and egress from the remainder for use by the public, including the owner of the land.~~

13. To make contracts with the County of Santa Barbara and with municipalities and public agencies, and to employ labor for the purpose of doing flood control work and for inspecting and passing upon the adequacy of drainage plans provided for each proposed new subdivision in the County of Santa Barbara.

Sec. 15. Water Code Appendix Section 105-6 is amended to read:

Sec. 6. The district is hereby declared to be a body corporate and politic and as such shall have, in addition to the other powers vested in it by this act, the following powers:

1. To have perpetual existence.
2. To sue and be sued in the name of the district.
3. To adopt a seal and alter it at pleasure.
4. To acquire by grant, purchase, lease, gift, devise, contract, condemnation or otherwise, and to hold, use, enjoy, sell, let, and dispose of real and personal property of every kind, including lands, structures, buildings, rights of way, easements, and privileges, excepting water rights owned by a public corporation or agency without the consent of such public corporation or agency, and to construct, maintain, alter and operate any and all projects or works of improvement, within or without the district, necessary or proper to carry out any of the objects or purposes of this act, or convenient to the full exercise of its powers, and to construct, complete, extend, add to, alter, remove, reconstruct, repair or otherwise improve any projects or works of improvement, or property acquired by it as authorized by this act.
5. To control the flood and storm waters of the district, and the flood and storm waters of streams that have their source outside of the district, but which streams and the flood waters thereof flow into the district, and to conserve such waters for beneficial and useful purposes within the district by retarding, spreading, storing, retaining and causing the same to percolate into the soil within or without the district, or to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district; provided, that water rights now existing, public or private, be not thereby taken or damaged without compensation; provided further, that none of the provisions of this act shall in any manner limit or preclude the full exercise by any county, city, district, public or municipal authority, agency or corporation, or any political subdivision that may now or hereafter exist, wholly or in part, within the district from exercising any of its powers, although such be of the same nature as the powers of the district. Any such other public entity may, by written agreement with the district, provide for the use, or joint use, of property or facilities in which any such other public entity has an interest, or for the use, or joint use, of property or facilities in which the district has an interest.
6. To cooperate and to act in conjunction with or contribute funds to, the United States or the State of California, or any of their engineers, officers, boards, commissions, departments or agencies, or with any public or private corporation, or with the County of San Diego, or with any public agency or district, in the construction of any projects or works of improvement for the controlling of flood or storm waters of or flowing into the district, or for the protection of life or property therein, or for the purposes of conserving said waters for beneficial use within said district, or for the protection of beaches and shorelines from erosion, or for the restoration of beaches and shorelines, or in any other works, acts or purposes provided for herein, and to adopt and carry out any definite plan or system of projects or works of improvement for any such purpose; and to enter into, and to do any and all acts necessary or proper for the performance of, any agreement with, or necessary to comply with any act of authorization of, the United States, or any state, county or district of any kind, or necessary and proper for the performance of any agreement with any public or private corporation, association, firm or individual, or any number of them, for the joint financing, acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, projects or works of improvement, or other property of any kind which might be lawfully acquired or owned by the district.
7. To acquire the right to store water in any reservoirs, or to carry water through any canal, ditch or conduit not owned by the district, and to grant to any person the right to carry any water owned by such person through any tunnel, canal, ditch or conduit of the district; provided, that the district shall not acquire any such rights from a municipality or public water agency or district other than with the consent of such municipality or public water agency or district.
8. To carry on technical and other investigations of all kinds, make measurements, collect data, and to make analyses, studies, and inspections pertaining to water supply, water rights, ocean currents, tides, erosion, control of floods, and use

of water, and to make surveys, studies, and maps and plats relative to the location of necessary projects and works of improvement including but not limited to dams, levies, channels, conduits, canals, pipelines, roadways and other rights-of-way, and relative to the acquisition of lands, or interests therein, and other property; provided, that the foregoing powers may be exercised by the district to the extent necessary to accomplish the purposes of this act; and further provided, that the district has the right of access, and may enter upon any lands within or without the district, irrespective of the ownership of such lands, with or without the permission of the owner of such lands, in order to accomplish the acts authorized by this section, or any of them, and such entry by the district or by its authorized representative shall not constitute, nor give rise to, any cause of action in favor of the owner or owners of such land except for injuries resulting from negligence, wantonness, or malice.

Whenever a project or work of improvement is contemplated due consideration shall be given to the location of existing sewage lines and to the possible locations of future sewage lines, and the district shall solicit the recommendations of public sewage disposal agencies in order that district facilities may be located equitably in light of such sewage lines.

9. To incur indebtedness and to issue bonds in the manner hereinafter provided.

10. To cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district, and to carry out any of the purposes of this act, in the manner hereinafter provided.

11. To make contracts, to employ labor, to employ expert appraisers, consultants and technical advisors and assistants, and to do all acts necessary for the full exercise of all powers vested by this act in said district or in any of the officers thereof.

12. The district has and may exercise the right of eminent domain within the County of San Diego, either within or without the district, and in the manner provided by law for the condemnation of private property for public use, to take any property necessary to carry out any of the objects or purposes of this act, whether such property be already devoted to any public use by any district or public corporation or agency, or otherwise; provided, however, that the district in exercising such power shall in addition to the damage for the taking, injury, or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railways, mains, pipes, conduits, wires, cable, poles or other property of any public utility or public corporation or district which is required to be moved to a new location; and provided further, that notwithstanding any provision of this act or any other law, no property shall be taken unless it is taken upon a finding by a court of competent jurisdiction that the taking is for a more necessary public use than that to which it has already been appropriated; and provided further, that no right shall exist in the district to take by proceedings in eminent domain any water rights appropriated to public use by any existing municipal corporation, water district, or other public agency. The district shall also have the right to and may condemn, within the County of San Diego, any existing works or improvements in the district or along streams flowing into the district now or hereafter used to control flood or storm waters, or to conserve such flood or storm waters or to protect any property in the district or along streams flowing into the district from damage from such flood or storm waters, or to protect beaches or shorelines from erosion or to restore such beaches or shorelines, and it is hereby declared that the use of the property, lands, rights-of-way, easements or materials which may be condemned, taken or appropriated under the provisions of this act is a public use subject to the regulation and control of the State of California in the manner prescribed by law; provided, however, that nothing in this act contained shall be deemed to authorize the district or any person to divert the waters of any river, creek, stream, irrigation system, canal or ditch or the waters thereof or therein unless compensation therefor be first provided in the manner prescribed by law.

The power of eminent domain vested in the district shall include the power to condemn in the name of the district either the fee simple or any lesser estate, easement or interest in any real property which the board by resolution shall determine is necessary for carrying out the purposes of this act.

Before property can be taken it must appear:

1. That the use to which it is to be applied is a use authorized by this act; and
2. That the taking is necessary to such use; provided, when the board, by resolution adopted by vote of two-thirds of all its members, has found and determined that the public interest and necessity require the acquisition, construction or completion by the district of some project or work of improvement, and that the property described in such resolution is necessary therefor, such resolution shall be conclusive evidence:

(a) of the public necessity for such proposed project or work of improvement;

(b) that such property is necessary therefor, and

(c) that such proposed project or work of improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, however, that said resolution shall not be such conclusive evidence in the case of the taking by the district of property located outside of the territorial limits thereof.

Whenever land is to be condemned by the district for any of the uses and purposes permitted by law, and the taking of a part of a parcel of land would leave the remainder thereof in such size or shape or condition as to require the district to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the board may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that the district acquire the whole of such parcel.

Whenever real property which is devoted to or held for some other public or quasi-public use is required by the district for any purpose authorized by this act, the district may condemn real property adjacent thereto or in the immediate vicinity thereof to be exchanged for the real property so required by the district.

Nothing in this act contained shall be construed as in any way affecting the plenary power of any existing municipal corporation, water district or other public agency providing water to the public or as affecting the absolute control of any properties of such municipal corporation, water district or public agency necessary for such water supply, and nothing herein contained shall be construed as vesting any power of control over such properties in the district or any officer thereof, or in any person referred to in this act, except to the extent consented thereto by such municipal corporation, water district or public agency.

13. To plan, improve, operate, maintain, and keep in a sanitary condition a system of public parks, playgrounds, beaches, swimming areas, and other facilities for public recreation, for the use and enjoyment of all the inhabitants of the district, as an incident to the carrying out of the projects and works of improvement of the district and on land acquired or used for the flood control, drainage, beach or shoreline erosion control, or water conservation purposes of this act; to construct, maintain, and operate any other amusement or recreational facilities on such lands, including picnic grounds and equipment incidental thereto, bathhouses, golf courses, tennis courts and other special amusements and forms of recreation; to fix and collect reasonable fees for the use by the public of any such special facilities, services or equipment; and to adopt such rules and regulations as in the discretion of the board are necessary to the orderly operation and control of the use by the public of such lands and facilities for recreational purposes; provided, however, that the district shall not, for the purposes specified in this subsection, interfere with the control or operation of any existing public park, playground, beach, swimming area, parkway, recreational ground, or other public property, owned or controlled by any other district, county or municipal corporation, except with the consent of the governing body of such district, county or municipal corporation, and upon such terms as may be mutually agreed upon between the board and such governing body; and further provided, that no such recreational facility shall be established in any city or in the unincorporated territory of a county without the consent of the governing body of such city or county, and further provided, that if any such recreational facility is located within the unincorporated territory of a county then that county, or if any such recreational facility is located within the corporate limits of any city then that city, by resolution duly passed by the governing body of such county or city, may assume the management and control of such recreational facility, in which event such county or city shall establish and collect nondiscriminatory fees and charges for the use of such recreational facility and may establish rules and regulations pertaining to such recreational facility, and the county or city annually shall deduct from such fees and charges an amount sufficient to reimburse the county or city for the costs and expenses incurred in such management and control of such recreational facility, and shall pay over to the district, for use for general district purposes, all money collected in excess of the amount necessary for such reimbursement.

14. The powers herein granted shall include the design, construction, or maintenance of any levees, seawalls, groins, breakwaters, jetties, outlets, channels, harbors, basins, or other projects or works of improvement pertaining thereto for the protection of shoreline or beaches.

15. To lease, sell or dispose of any property or interest therein whenever, in the judgment of the board, said property or said interests therein or part thereof is no longer required for the purposes of the district, or may be leased for any purpose without interfering with the use of such property for the purposes of the district, and to pay any compensation received therefor into the general fund of the district and use the same for the purposes of this act; provided, however, that nothing herein contained shall authorize the board or any officer of said district to sell, lease or otherwise dispose of any water, water right, reservoir space or storage capacity or any interest or space therein, except to public agencies for recreational purposes or except as heretofore provided in subsection 6 of this section, or except, in the discretion of the board, as is necessarily incidental to the accomplishment of the purposes of this act or to the public welfare; provided, however, that the district may grant and convey to the United States, or to any federal agency authorized to accept and pay for such land or interests in land, all lands and interests in land, now owned or hereafter acquired, lying within any channel, dam, or reservoir site, or shoreline or beach, improved and constructed, in whole or in part, with federal funds, upon payment to the district of sums equivalent to actual expenditures made by it in acquiring the lands and interests in land so conveyed, and in improving such lands and interests in land, deemed reasonable in the discretion of the board.

16. To grant or otherwise convey to counties, cities and counties, cities, the State of California or the United States easements for street and highway purposes over, along, upon, in, through, across or under any real property owned by the district.

17. To remove, carry away and dispose of any rubbish, trash, debris, or other inconvenient matter that may be dislodged, transported, conveyed, or carried by means of, through, in or along the works and structures operated or maintained hereunder and deposited upon the property of the district or elsewhere.

18. Notwithstanding any provision of this act, the district shall not have the power to compete with water selling or distribution agencies, either public or private, by selling or distributing water to consumers for domestic, agricultural or industrial use; provided, however, that the district shall have the power to sell to water agencies, either public or private, such surplus water as it may accumulate. (Stats. 1966, 1st Ex. Sess., c. 55, p. —, § 6.)

The following section, relating to this matter, would not be amended or repealed:

**§ 1504. Compensation; ascertainment; acquisition of property when compensation equal to value of property of utility**

Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court of competent jurisdiction pursuant to the laws of this state relating to eminent domain, including consideration of the useful value to the political subdivision of the property so taken.

Whenever the compensation by a political subdivision under this section is an amount equal to the just compensation value of all the property of the private utility in the operating system that the private utility employs in providing water service to the service area, the political subdivision may, by resolution, provide for the acquisition of all such property.

A political subdivision engaged in activities set forth in Section 1503 shall pay just compensation for the property so taken for public purposes. (Added Stats. 1965, c. 1752, p. 3925, § 1.)

## DRAFT STATUTE - PROTECTIVE ACQUISITIONS

Section 1. Section 1265.2 is added to the Code of Civil

Procedure, to read:

1265.2. (a) As used in this section, "property to be acquired for protective purposes" means property to be acquired under the authorization provided in subdivision (b).

(b) A public entity authorized to acquire property for a public work or improvement by eminent domain may also acquire by eminent domain property which is reasonably necessary to protect the public work or improvement and its environs or to preserve the view, appearance, light, air, or usefulness of the public work or improvement. Property so acquired may be conveyed by the public entity subject to restrictions concerning the future use and occupation of such property so as to protect the public work or improvement and its environs and to preserve the view, appearance, light, air, and usefulness of such public work or improvement.

(c) If the public entity plans to reconvey property to be acquired for protective purposes, the public entity may acquire the property by eminent domain only if the court finds that the acquisition of the property is reasonably necessary for the purpose of protecting the public work or improvement and its environs or to preserve the view, appearance, light, air, or usefulness of the public work or improvement.

(d) The condemnor has the burden of proof to establish the facts that justify the taking of property to be acquired for protective purposes in the case described in subdivision (c). However, in any

such case, if the condemnor has adopted a resolution of necessity which contains an express finding that the property is needed to protect the public work or improvement and its environs or to preserve the view, appearance, light, air, or usefulness of such public work or improvement, it is presumed that the taking of the property to be acquired for protective purposes is justified under subdivision (c).

(e) The presumption established by subdivision (d) is:

(1) A presumption affecting the burden of proof to the extent that the property to be acquired for protective purposes is within two hundred feet from the closest boundary of the public work or improvement.

(2) A presumption affecting the burden of producing evidence to the extent that the property to be acquired for protective purposes is not within two hundred feet from the closest boundary of the public work or improvement.

(f) If the public entity proposes to sell property acquired by eminent domain under the authorization provided by subdivision (b) subject to restrictions concerning the future use and occupation of the property within five years from the time the property was acquired, the person from whom the property was acquired shall be provided with an opportunity to repurchase the property on terms equal to the best terms offered by any other person to whom the public entity proposes to sell the property.

Sec. 2. Article 4.5 of Chapter 1 of Division 1 of Title 1 of the Government Code is repealed.

Note: This article reads as follows:

**§ 190.** Land, definition. "Land" when used in this article includes any interest, easement, or reservation in land.

**§ 191.** Application of chapter. Whenever the State or any city or county may acquire land in excess of the land actually needed or used for public purposes in connection with the establishing, laying out, widening, enlarging, extending, or maintaining of memorial grounds, streets, squares, parkways, or reservations, the acquisition, maintenance, and use of such land and the sale, disposition, and conveyance and the establishment in connection therewith of any reservations concerning the future use and occupation of such land so as to protect the public works or improvements and their environs which it adjoins and to preserve the view, appearance, light, air, and usefulness of such public works shall be conducted and maintained pursuant to this article.

**§ 192.** Construction of acts. Every act of the State authorizing the State, any city or county to acquire land for the purposes of establishing, laying out, widening, enlarging, extending, or maintaining memorial grounds, streets, squares, parkways, or other public places, shall be construed as including among its purposes the acquisition of land in excess of the land actually needed or used for public purposes.

**§ 193.** Authority to sell; reservation of easement, interest, or right. If the State, any city, or county acquires any land under Section 14½ of Article I of the Constitution or this article, which land is in excess of the land actually needed or used for public purposes, the State, city, or county may sell such land or any interest therein and may reserve in the land any reservation, easement, interest, or right that public interest, necessity, or convenience requires to preserve the view, appearance, light, air, and usefulness of any public memorial grounds, streets, squares, parkways, places, or works.

**§ 194.** Prohibition against sale except by legislative body; notice of sale. No such sale shall be made by a city or county except by its legislative body, nor until after notice has been published in the jurisdiction of the legislative body pursuant to Section 6064. The notice shall:

- (a) Describe the land or lands to be sold.
- (b) Set forth in general terms the interests, easements, or reservations to be reserved by the public.
- (c) State the time and place of the sale.
- (d) Call for sealed bids in writing.

**§ 195.** Opening of bids, sale to highest bidder, rejection of bids. At the time and place set for the sale, the legislative body shall open any bids received in response to the notice and shall sell the land to the highest bidder, except that it may at that time or at any time to which the sale is continued receive any higher bids and may reject any bid failing to comply with the terms of purchase set forth in the notice.

**§ 196.** Disposition of proceeds of sale, refunds. Money derived from the sale of land pursuant to this article shall be immediately paid into the fund from which payment was made for the land. If the land was purchased with funds derived from the levy of any assessment or tax upon property benefited, the money derived from the sale of the land shall be distributed as refunds to the persons paying those assessments or taxes in proportion to the amounts levied or assessed against them or thereafter to be levied or assessed against them to meet any bonds as yet unpaid by them. Money to be refunded to any person pursuant to this article shall first be applied to any indebtedness of such person or his successor in interest on account of any tax or assessment levied or any bond issued to pay the cost of any improvement done or performed by the public body, all or part of the cost of which is levied or taxed against the land of that person.

§ 104.3

Sec. 3. Section 104.3 of the Streets and Highways Code is repealed.

~~104.3. The department may condemn real property or any interest therein for reservations in and about and along and leading to any state highway or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 150 feet from the closest boundary of such public work or improvement; provided, that when parcels which lie only partially within such limit of 150 feet are taken, only such portions may be condemned which do not exceed 200 feet from said closest boundary.~~

§ 256

Sec. 4. Section 256 of the Water Code is repealed.

~~256.--The department may condemn real property or any interest therein for reservations in and about and along and leading to any state dam or water facility or other public work or improvement constructed or to be constructed by the department and may, after the establishment, laying out and completion of such improvement, convey out any such real property or interest therein thus acquired and not necessary for such improvement with reservations concerning the future use and occupation of such real property or interest therein, so as to protect such public work and improvement and its environs and to preserve the view, appearance, light, air and usefulness of such public work; provided, that land so condemned under authority of this section shall be limited to parcels lying wholly or in part within a distance of not to exceed 500 feet from the closest boundary of such public work or improvement; provided, that when parcels which lie only partially within such limit of 500 feet are taken, only such portions may be condemned which do not exceed 600 feet from said closest boundary.~~

Other sections related to protective condemnation which are not recommended for amendment or repeal:

**Code of Civil Procedure Section 1239.4:**

§1239.4. Protecting Approaches to Airport.—Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height or may be acquired by a county, city or airport district in fee. Leg.H. 1945 ch. 1242, 1961 ch. 965.

**Government Code Section 6950:**

§ 6950. Legislative intent; preservation of open spaces for public use and enjoyment. It is the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

Government Code Section 6951:

**§ 6951.** Spread of urban development; scenic or esthetic value of open areas and spaces. The Legislature finds that the rapid growth and spread of urban development is encroaching upon, or eliminating, many open areas and spaces of varied size and character, including many having significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban and metropolitan development.

Government Code Section 6952:

**§ 6952.** Legislative declaration; expenditure of public funds. The Legislature hereby declares that it is necessary for sound and proper urban and metropolitan development, and in the public interest of the people of this State for any county or city to expend or advance public funds for, or to accept by, purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest or right in real property to acquire, maintain, improve, protect, limit the future use of or otherwise conserve open spaces and areas within their respective jurisdictions.

Government Code Section 6953:

**§ 6953.** Legislative declaration; public purpose. The Legislature further declares that the acquisition of interests or rights in real property for the preservation of open spaces and areas constitutes a public purpose for which public funds may be expended or advanced, and that any county or city may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any county or city may also acquire the fee to any property for the purpose of conveying or leasing said property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this chapter.

Government Code Section 6954:

**§ 6954. Definitions.** For the purposes of this chapter an "open space" or "open area" is any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.

Government Code Section 7000:

**§ 7000. Legislative intent; easements.** It is the intent of the Legislature in enacting this chapter to provide a means whereby the Department of Water Resources, Parks and Recreation, Fish and Game, and Finance, of the State of California, may acquire by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property in order to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve for public use and enjoyment any of the lands and areas, identified below, alongside the Westside Freeway, Interstate Route 5, and the California Aqueduct, which have significant scenic values:

(a) Between the California Aqueduct and the Westside Freeway from Highway 41 north to Milham Avenue.

(b) Between the California Aqueduct and the Westside Freeway from Ness Avenue north to Pioneer Road.

(c) Between the California Aqueduct, the Westside Freeway and the Delta-Mendota Canal from Cottonwood Road north to the freeway-aqueduct crossing at Orestimba Creek, and between the aqueduct and freeway north of that point to the Alameda county line.

The Department of Public Works may acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in lands adjacent to highway rights-of-way, provided further that the federal government reimburses the State for the costs of such scenic easements, and also provided that the use of money for this purpose will not reduce the amount of funds which would otherwise be available to the State for highway purposes.

Government Code Section 7001:

**§ 7001. Public purpose of acquisition.** The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas provided for in Section 7000 constitutes a public purpose for which public funds may be expended or advanced, and that any of the state departments specified in this chapter may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any of said departments may also acquire the fee to any of the property for the purpose of conveying or leasing said property back to its original owner or another person under such covenants or other contractual arrangements as will conserve the scenic character and value of the property in accordance with the purposes of this chapter.

Section 14-1/2 of Article I of the California Constitution

should be repealed. This section reads:

Sec. 14 $\frac{1}{2}$ . The State, or any of its cities or counties, may acquire by gift, purchase or condemnation, lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, squares, parkways and reservations in and about and along and leading to any or all of the same, providing land so acquired shall be limited to parcels lying wholly or in part within a distance not to exceed one hundred fifty feet from the closest boundary of such public works or improvements; provided, that when parcels which lie only partially within said limit of one hundred fifty feet only such portions may be acquired which do not exceed two hundred feet from said closest boundary, and after the establishment, laying out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

The Legislature may, by statute, prescribe procedure.

(Added Nov. 6, 1928.)